



Comptroller General
of the United States
Washington, D.C. 20548

8371312

Decision

Matter of: Fields & Associates

File: B-258021

Date: December 7, 1994

Patrick D. Allen, Esq., Butkus & Reimer, P.C., for the protester.
Kenneth M. Homick, Esq., Cynthia S. Guill, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to conduct a procurement for military family housing maintenance on an unrestricted basis, and not as a small disadvantaged business (SDB) set-aside, was unobjectionable where record shows that, based on review of the procurement history of offers received for the services, inquiry into SDB firms who had requested the solicitation, and review of the Small Business Administration's automated computer system of SDB firms, the contracting officer could not reasonably expect to receive offers from at least two technically capable, responsible SDB concerns at acceptable prices.

DECISION

Fields & Associates protests the Department of the Navy's decision to issue request for proposals (RFP) No. N62472-94-R-1612, for military family housing maintenance/repair and alteration, at the Naval Education and Training Center (NETC), Newport, Rhode Island, on an unrestricted basis. The protester contends that the agency was required by applicable regulations to issue the solicitation as a small disadvantaged business (SDB) set-aside.

We deny the protest.

An acquisition of services, such as here, is required to be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns; (2) award will be made at a price not exceeding the fair market price by more than 10 percent;

and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-2-70(a); Simpson Contracting Corp., 73 Comp. Gen. 55 (1993), 93-2 CPD ¶ 331.

In determining whether to issue the RFP here as an SDB set-aside, the contracting officer considered the offers received on the previous solicitation for housing maintenance services at NETC, which had been issued as a small business set-aside. Of the seven offers received, two were from SDBs, and only one, the protester's, was price competitive; the other SDB's price, more than 300 percent of the award price, was the highest received. The contracting officer also considered the effect on the procurement of Rhode Island regulations for the removal and handling of lead-based paint; she determined that the restrictions imposed by these regulations would limit the number of firms, including SDBs, which could perform the maintenance work under this RFP. Based on these considerations, the contracting officer determined that there was not a reasonable expectation of receiving two or more offers from technically capable, responsible SDB firms at acceptable prices, and issued the RFP as unrestricted.

The Navy published a synopsis in the Commerce Business Daily (CBD) on January 28, 1994, announcing its intent to procure the housing maintenance services on an unrestricted basis, and issued the unrestricted solicitation on May 16, 1994. The protester filed an agency-level protest on June 7, arguing that "the bidders' list indicates that there is sufficient competition" for the procurement to be set aside for SDBs. In response to the protest, the agency reviewed its nonset-aside determination, considering several factors. First, the Navy attempted to contact the four SDBs (other than the protester) which had requested the solicitation in response to the CBD notice. Two of the firms failed to respond to the agency's telephone messages (three attempts were made to each firm) and one firm indicated that it would be able to furnish supplies as a subcontractor only. Although the remaining firm, a heating and air conditioning contractor, indicated that it would submit an offer for this project, the contracting officer discounted this possibility because the firm's bidding history showed it previously had bid only on mechanical contracts and had submitted no bids in the housing maintenance area. The Navy also reviewed the Small Business Administration's (SBA) Procurement Automated Source System (PASS) for local (i.e., New England) SDB firms capable of performing the requirement, but found no local SDB firms with housing maintenance expertise listed. Finally, the agency consulted with the local SBA procurement center representative (PCR) who, after reviewing the information the contracting officer had considered,

concurred in a written statement with the decision to issue the solicitation on an unrestricted basis. The Navy thus denied the agency-level protest.

Fields then filed this protest with our Office on July 28, arguing that the Navy failed to undertake reasonable efforts to determine whether it was likely to receive offers from at least two technically acceptable, responsible SDBs likely to offer acceptable prices.

We consider the determination of the likelihood of receiving sufficient offers from SDBs to be a business judgment within the contracting officer's discretion; we thus will not disturb a contracting officer's set-aside determination unless it is unreasonable. McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318. However, a contracting officer must undertake reasonable efforts to ascertain whether she is likely to receive offers that would support a decision to set aside a procurement for SDB concerns, and we will review a protest to determine whether a contracting officer has done so. See Neil R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

The Navy's efforts, described above, to ascertain whether there would be sufficient SDB competition to warrant a set-aside clearly were reasonable, as was its ultimate determination. The Navy reviewed the procurement history for the previous solicitation of the same services; this indicated there had been no competitively priced offers from SDB firms, other than the protester. The Navy's review of the four SDB firms (other than the protester) which requested the RFP showed that the only one asserting that it would submit an offer had never competed for the work before and did not show experience in housing maintenance; we think it was reasonable to conclude that this firm could not realistically be expected to submit a viable offer. The Navy's search of the SBA's PASS data base for local SDB firms capable of performing the work also failed to locate

¹The protester contends that this firm, General Air Conditioning & Heating, Inc., may have had housing maintenance experience, and that the agency reasonably should have inquired further into the firm's background. We disagree. Besides the firm's lack of housing maintenance bidding history, as described above, the firm's own letterhead indicated that it was a "mechanical contractor" in the areas of "industrial heating and cooling," "controls," "refrigeration," "boiler repairs," and "installation." There thus was no reason for the Navy to suspect that the firm was a viable prospective offeror.

any likely SDB offerors.² Finally, the agency conferred with SBA's PCR who reviewed the circumstances pertaining to the solicitation and concurred with the contracting officer's decision to issue the solicitation unrestricted; we generally give great weight to the views of the SBA representative in these matters. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. We conclude that the Navy made a reasonable effort to survey the market place to determine the likelihood of receiving acceptable SDB offers, and that the agency reasonably determined,³ based on this effort, that a set-aside was not appropriate.

Fields maintains that the Navy should have advertised the solicitation as unrestricted or published a synopsis requesting statements of interest. However, given the agency's initial determination that an SDB set-aside was not warranted, there was no reason for it to proceed in this manner. The agency's subsequent inability to identify potential SDB offerors tends to support the Navy's judgment in this regard.

The protester maintains that the PASS in fact listed four suitable SDB firms and that, in any event, the PASS search was inadequate because it was limited to New England firms. During the course of this protest, the agency reviewed the PASS work descriptions of the four firms at issue and determined that three of the firms had no family housing maintenance expertise and the remaining firm, while perhaps capable of doing the work, had a bidding history of noncompetitive bids and therefore could not be expected to submit an offer not exceeding the fair market price by

²Additionally, the record indicates that a contract specialist contacted Fields to investigate the possibility of their knowing any SDB firms that the Navy may not have considered in making the determination to issue the solicitation unrestricted. Fields declined to provide any SDB firm names for the Navy to review because the firm believed that such conduct "could be construed as collusion" with potential competitors.

³Fields challenges the agency's original determination that lead-based paint regulations would limit the number of SDB firms with the technical ability to perform the contract; it maintains that the work could be subcontracted. We need not resolve the disagreement on this question, since we have found that the agency's investigation otherwise reasonably established that there would not be sufficient SDB competition to warrant setting the requirement aside.

10 percent.⁴ Contrary to the protester's contention that the agency should have nevertheless contacted the firm, under these circumstances, we believe that the agency reasonably viewed this firm as unlikely to submit an acceptable SDB offer. Further, we see nothing unreasonable in limiting the PASS search to New England SDBs. As discussed above, the SBA's PCR concurred in this decision, based on her observation that with "the exception of the protester, few SDB companies have the financial capability to set up and maintain offices and major operations at great distances from their home offices."⁵

The protest is denied.

/s/Robert H. Hunter
for Robert P. Murphy
Acting General Counsel

⁴For a solicitation for janitorial services, this firm's bid was approximately 46 percent higher than the successful contractor's bid, 45 percent higher than the apparent second-low, and 37 percent higher than the apparent third-low. For a solicitation for custodial/grounds maintenance/window washing/snow removal services, this firm's bid was approximately 85 percent higher than the successful contractor's bid, 75 percent higher than the apparent second-low, and 40 percent higher than the apparent third-low.

⁵The protester has submitted a letter from a Kentucky-based SDB firm that performs housing maintenance at military bases in Colorado and Missouri, expressing interest in this procurement if it were SDB restricted. However, we do not think a single general expression of interest solicited by a protester provides a sufficient basis for us to conclude that a nationwide search for interested SDB firms was called for.